

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

In re: § Chapter 11
§ Case No. 23-10671-cgb
STEEPOLOGIE, LLC §
Debtor §

**DEBTOR'S BRIEF IN SUPPORT OF
RESPONSE TO MOTION TO COMPEL PAYMENT OF POST-PETITION RENT AND
OTHER APPROPRIATE RELIEF**

COMES NOW Steepologie, LLC and files this Brief in Support of Response to Motion to Compel Payment of Post-Petition Rent and Other Appropriate Relief and would show as follows:

Issue: What is the proper remedy for failure to timely pay post-petition rental obligations under 11 U.S.C. §365(d)(3)?

In this case it is undisputed that the Debtor owed rent to the Alderwood Mall for September 2023 and that the Debtor did not timely pay this rent. Section 365(d)(3) says that the trustee “shall timely perform all of the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” However, the Code does not state what the remedy for failure to make timely payment is. Movant Alderwood Mall views Section 365(d)(3) as creating a form of super priority claimant subject to immediate payment. However, the vast weight of authority holds that an unpaid landlord is entitled to an administrative claim under 11 U.S.C. Sec. 503(b)(1). In the context of a Subchapter V case, that administrative claim may be paid out over the life of the plan.

There is no Stated Remedy for Violation of Section 365(d)(3)

Many cases conclude that Section 365(d)(3) does not provide a remedy for its violation.

CIT Commun. Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.), 406 F.3d 229, 235 (4th Cir. 2005)(“While it is clear that § 365(d)(10) and § 365(d)(3) impose on a trustee the duty to perform all lease obligations in a timely manner, these sections do not specify a lessor's remedy should the trustee fail to perform.”); *In re Simbaki, Ltd.*, 2015 Bankr. LEXIS 1142 (Bankr. S. D. Tex. 2015)(“The statute is silent, however, as to the precise remedies available to a landlord whose tenant ignores § 365(d)(3) and fails to pay post-petition rent.”); *In re Bella Logistics, LLC*, 583 B.R. 674 (Bankr. W.D. Tex. 2018)(“The statute is silent, however, as to the precise remedies available to a landlord whose tenant ignores § 365(d)(3) and fails to pay post-petition rent.

What Should the Remedy Be?

If a debtor intends to assume an unexpired lease but fails to timely pay post-petition rent, the court has several remedies available. Since a debtor must cure all arrearages prior to assuming an unexpired lease, it is clear that the debtor must pay the post-petition rent or forfeit the ability to assume the lease. As a result, the court could compel the debtor to pay the rent or deem the lease rejected. However, debtor has taken that remedy off the table by voluntarily rejecting the lease.

Chief Judge Craig Gargotta has rejected the argument that section 365(d)(3) creates an independent super priority for the reason that there would be no basis for treating a claim under section 365(d)(3) in a converted case. He found that

it is unclear whether an independent §365(d)(3) administrative expense claim can be paid under the Bankruptcy Code. Id. "Section 507 of the Code, which sets forth the priority of payments in a bankruptcy case, gives high priority to 'administrative expenses allowed under section 503(b) of this title,' but makes no mention of claims under § 365(d).

583 B.R. at 681. Judge Gargotta concluded that the claim should be treated as an administrative

claim under 11 U.S.C. Sec. 503(b). This is in accord with the Fourth Circuit in *Midway*, Judge Marvin Isgur in *Simbaki* and Judge Barbara Hauser in In *In re Imperial Beverage Group, LLC*, 457 B.R. 490 (Bankr. N.D. Tex. 2011).

Alderwood Mall argues that the reference to “notwithstanding section 503(b)(1)” takes a claim under Sec. 365(d)(3) outside of section 503. However, as stated in *3 Collier on Bankruptcy ¶ 365.04[1][b]* (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011), the majority view is that the reference to “notwithstanding” means that the landlord need not prove that the amount of the rent was an “actual, necessary costs of preserving the estate” and would be entitled to an administrative expense for the contractual amount of the rent. As the District Court for the Western District of Texas stated, “Augusta contends, and most of the courts to address the issue have held, that Section 365(d)(3) plainly requires that unpaid nonresidential lease obligations be accorded priority status as an administrative expense of the estate, without proof of the necessity and benefit otherwise required by Section 503(b)(1)(A).” *Augusta Mall Partnership v. Twigland Fashions (In re Twigland Fashions)*, 198 B.R. 199, 200 (W.D. Tex. 1996).

Administrative Claims are Not Entitled to Immediate Payment in Subchapter V

Once the Court determines that Alderwood Mall is entitled to an administrative claim under Section 503(b)(1)(A), then it becomes clear that immediate payment of the claim cannot be mandated. Under 11 U.S.C. Sec. 1191(e), “Notwithstanding section 1129(a)(9)(A) of this title, a plan that provides for the payment through the plan of a claim of a kind specified in paragraph (2) or (3) of section 507(a) of this title may be confirmed under section (b) of this section.” Section 507(a)(2) refers to administrative claims under section 503(b). Thus, if a claim for post-petition rent is properly classified as an administrative claim under section 503(b), it may be paid out over the life of a plan and may not be compelled for immediate payment.

Alderwood Mall cites to *In re Seven Stars on the Hudson Corp.*, 618 B.R. 333 (Bankr. S.D. Fl. 2020) for the contrary proposition. However, *Seven Stars* is not persuasive. *Seven Stars* was a case about whether the debtor may convert a pending case to Subchapter V after the applicable deadlines have passed. The Court's holding was that the Subchapter V deadlines may only be extended if the need for the extension is attributable to factors to which the debtor should not justly be held accountable. The Court found that the decision to convert to Subchapter V after the deadlines had expired was a factor entirely within the debtor's control. In a footnote, the Court offered its observations on rental obligations as dicta. The Court started out by stating that "(b)ecause the Court is basing its ruling on a plain reading of the applicable statutes and rules, the Court need not address MDG's vested rights and retroactivity arguments." *In re Seven Stars*, fn. 82. The Court stated that "administrative rent must be paid as a condition of assumption." *Id.* The court went on to state that the obligation to pay post-petition rent is found solely in section 365(d)(3) and not in section 503(b). However, the court did not discuss any case law in support of its position. *Seven Stars* is doubly dicta because first of all, it was not necessary to the holding and because the court was apparently dealing with a lease that the debtor wished to assume. It is clear that in order to assume a lease, a debtor must cure arrearages. However, this case involves a rejected lease where the vast weight of authority in this state holds that the claim is one under section 503(b)(1) and that therefore it may be paid out over the life of the plan.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response was served by first class mail, postage prepaid and properly addressed, on October 20, 2023 to all parties listed on the attached Service List, to the persons listed below by email and electronically by the Court's ECF system to all parties registered to receive such service.

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